FILED
NOV 12 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 99-5153

In The

Supreme Court of the United States

CORNELL JOHNSON,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed July 2, 1999
Certiorari Granted October 18, 1999

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52 pp

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RELEVANT DOCKET ENTRIES

Date	Proceedings
1993	
Oct. 26	Indictment filed
Dec. 15	Plea Agreement filed
1994	
March 8	Judgment and Commitment
1998	
March 5	Petition for Warrant or Summons for Offender Under Supervision
April 30	Supervised Release Revocation Hearing
April 30	Dispositional Report filed
May 1	Judgment for Revocation of Supervised Release
May 5	Notice of Appeal by Defendant filed
1999	
April 29	Order Judgment of the United States Court of Appeals for the Sixth Circuit Affirming the District Court's Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

UNITED STATES OF AMERICA	)	**CR-1-93-138**
V.	)	**Edgar**
SEAN ANTHONY JESSIE; CORNELL JOHNSON; and BRICE WILLIAM MYLES	)	

INDICTMENT

(Filed Oct. 26, 1993)

COUNT ONE

The Grand Jury charges that on or about October 22, 1993, in the Eastern District of Tennessee and elsewhere, the defendants, SEAN ANTHONY JESSIE, CORNELL JOHNSON, and BRICE WILLLIAM MYLES, did conspire with each other and others to the Grand Jury unknown, to commit an offense under 18 U.S.C. § 1029(a), that is, the defendants did knowingly and with intent to defraud produce, use and traffic in one or more counterfeit access devices, which conduct affected interstate commerce, and did engage in conduct in furtherance of that offense; all in violation of 18 U.S.C. 1029(b)(2).

COUNT TWO

The Grand Jury further charges that on or about October 22, 1993, in the Eastern District of Tennessee and elsewhere, the defendants, SEAN ANTHONY JESSIE,

CORNELL JOHNSON, and BRICE WILLLIAM MYLES, knowingly and with intent to defraud attempted to produce, use and traffic in one or more counterfeit access devices, which conduct affected interstate commerce, in violation of 18 U.S.C. 1029(a)(1); all in violation of 18 U.S.C. § 1029(b)(1).

A TRUE BILL:

/s/ Rebecca Illegible
GRAND JURY FOREMAN

/s/ Carl K. Kirkpatrick
CARL K. KIRKPATRICK
United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

UNITED STATES OF AMERICA	)	**CR-1-93-138**
V.	)	
CORNELL JOHNSON	)	

PLEA AGREEMENT

(Filed Dec. 15, 1993)

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States of America, by Carl K. Kirkpatrick, United States Attorney for the Eastern District of Tennessee, and the defendant, CORNELL JOHNSON, and his attorney, C. Leland Davis, have agreed upon the following:

The defendant will plead guilty to Count One of the indictment, charging him with a violation of 18 U.S.C. § 1029.

Pursuant to Rule 11(e)(1)(A), Federal Rules of Criminal Procedure, the United States agrees that it will move the court at the time of sentencing to dismiss Count Two.

Pursuant to Rule 11(e)(1)(C), Federal Rules of Criminal Procedure, the parties agree that the appropriate disposition of this case would be a sentence within the lower one-third of the applicable sentencing guideline range as to any fine and imprisonment.

The defendant agrees to make full and complete restitution to any victims in this case in such amounts and in such manner as the court may determine.

The special assessment of $50 per count shall be paid no later than the day of the plea proceeding.

The defendant acknowledges that he understands that his case is governed by the sentencing guidelines, and that he has discussed the guidelines with his attorney. In consideration of the United States' acceptance of this agreement, the defendant expressly waives the right to appeal his conviction or sentence on any ground, including any appeal right conferred by 18 U.S.C. § 3742. The defendant further agrees not to file any motions or pleadings pursuant to 28 U.S.C. § 2255. Thus, the defendant knowingly, intentionally, and voluntarily waives his right to collaterally attack the plea being offered in the instant case. The defendant further acknowledges that a breach of this clause of the plea agreement (like the defendant's breach of any other clause of the plea agreement) would leave the United States free to withdraw from the plea agreement.

Based upon the evidence presently available to the parties, the parties view this case as one where the defendant has accepted responsibility for his involvement in this offense.

Should the defendant withdraw from this plea agreement for any reason, any statement made by the defendant subsequent to his signing this plea agreement may be used for any purpose by the United States.

By his signature to this agreement, the defendant acknowledges that he has discussed with his attorney each provision of this agreement and understands the potential consequences of each provision of this agreement.

The parties further agree that this plea agreement constitutes the full and complete agreement and understanding between the parties concerning the defendant's guilty plea to the above-referenced charge, and that there are no other agreements, promises, undertakings, or understandings between the defendant and the United States.

CARL K. KIRKPATRICK
United States Attorney

/s/ Gary S. Humble
Gary S. Humble
Assistant U.S. Attorney

/s/ **Cornell Johnson** 11/30/93
Cornell Johnson Date
Defendant

/s/ **C. Leland Davis** 11/30/93
C. Leland Davis Date
Attorney for Defendant

UNITED STATES DISTRICT COURT
EASTERN District of TENNESSEE

UNITED STATES OF AMERICA

V.

CORNELL JOHNSON

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Mar. 8, 1994)

Case Number:
CR-1-93-00138-002

C. Leland Davis, c/o
District Attorney's Office
600 Market Street
Chattanooga, TN 37402
Appointed Counsel
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count~~(s)~~ One (1) of the Indictment
[ ] was found guilty on count(s) _____
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18: 1029(b)(2)	Did conspire to commit an offense under 18 USC Section 1029(a), that is, knowingly with intent to defraud produce, use and traffic in one or more counterfeit access devices, which conduct affected interstate commerce, and did engage in conduct in furtherance of that offense.	Oct. 22, 1993	Count One (1)

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[X] Count~~(s)~~ Two (2) (is)(~~are~~) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) One (1) of the Indictment, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 250-04-0337

Defendant's Date of Birth: May 9, 1954

Defendant's Mailing Address:
1762 N. Springdale Place
Florence, SC 29506

Defendant's Residence Address:
1762 N. Springdale Place
Florence, SC 29506

Monday, February 28, 1994
Date of Imposition of Sentence

/s/ R. Allan Edgar
Signature of Judicial Officer

R. ALLAN EDGAR,
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

3/8/94
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Twenty-five (25) months upon Count One (1) of the Indictment.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ___ a.m./p.m. on ___.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) years upon Count One (1) of the Indictment.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of

supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[X] The defendant shall pay any ~~fines~~/restitution that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

The defendant shall participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as he is released from the program by the probation officer.

The defendant shall participate in a program of mental health treatment as directed by the probation officer, until such time as he is released from the program by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

[X] The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Food Lion, Incorporated Attn: Check Recovery P. O. Box 1549 Salisbury, NC 28145-1549	$ 663.96
Western Union Attn: Ruth Williams Western Union Financial Services 13022-A Hollenberg Drive Bridgeton, MO 63044	$3,000.00
TOTAL	$3,663.96

Any payment made that is not payment in full shall be divided proportionately among the payees named above.

Payments of restitution are to be made to:

[ ] the United States Attorney for transfer to the payee(s).

[X] the payee(s), through the office of the U. S. District Court Clerk

Restitution shall be paid:

[X] in full immediately.

[ ] in full not later than _____.

[ ] in equal monthly installments over a period of ___ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

[ ] in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

[ ] The defendant is ordered to forfeit the following property to the United States:

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 11

Criminal History Category: V

Imprisonment Range: 24 to 30 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 2,000.00 to $ 20,000.00

[X] Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $ 3,663.96

[ ] Full restitution is not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range.

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

* * *

United States District Court

for

Eastern District of Tennessee

Petition for Warrant or Summons for Offender Under Supervision

(Filed Mar. 5, 1998)

Case Number: CR-1-93-138-002

Name of Offender: Cornell Johnson

Name of Sentencing Judicial Officer: Honorable R. Allan Edgar

Date of Original Sentence: 02/28/94

Original Offense: Conspiracy to Produce, Use and Traffic in Counterfeit Access Devices in violation of Title 18 U.S.S.C. § 1029(b)(2)

Class: D Felony Criminal History Category: V

Original Sentence: Twenty-five month term of incarceration to be followed by a three year term of supervised release with the conditions that 1) The defendant pay restitution in the amount of $663.96 to Food Lion, Inc. of Salisbury, N.C. and $3000 to Western Union of Bridgeton, MO, for a total of $3663.96, 2) The defendant provide the probation officer with access to any requested financial information, 3) The defendant not incur any new lines of credit or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule, 4) The defendant participate in a program of testing and/or drug treatment as directed by the probation officer, until such time as he is released from the program by the

probation officer, 5) The defendant participate in a program of mental health treatment as directed by the probation officer, until such time as he is released from the program by the probation officer.

Type of Supervision: Supervised Release

Date Supervision Commenced:	Date Supervision Expires:
08/14/95	08/13/98

Assistant U.S. Attorney:	Defense Attorney:
Gary Humble	C. Leland Davis

PETITIONING THE COURT

[X] To issue a warrant
[ ] To issue a summons

The probation officer believes that the offender has violated the following condition(s) of supervision:

Violation Number	Nature of Noncompliance
I	**VIOLATION OF GENERAL CONDITIONS OF SUPERVISION**: The defendant shall not commit another federal, state or local crime.

According to U.S. Probation Officer, Joe Barton, Atlanta, Georgia, Mr. Cornell Johnson was arrested on 03/03/96, by the Newport News, Virginia Police Department and charged with three counts of Forgery and three counts of Uttering a Forged Instrument in violation of Virginia State Code § 18.2-172, after attempting to pass a counterfeit payroll check, using a ficticious [sic] name and identification card issued by the State of Virginia, to a Food

Lion food store, located in Newport News. This constitutes a violation of the offender's conditions of supervised release.

According to Detective Linda Spruill, of the Newport News, Virginia Police Department, Johnson is now being held in the Newport News city jail without bond.

II	**VIOLATION OF STANDARD CONDITION #1**: The defendant shall not leave the judicial district without the permission of the Court or probation officer.

Cornell Johnson traveled outside the Northern District of Georgia, which is the district of supervision at this time, without written travel authorization from the probation office. This unauthorized travel is evidenced by Johnson's arrest in Newport News, Virginia on March 3, 1996, for Forgery and Uttering a Forged Instrument.

U.S. Probation Officer Recommendation: That a warrant be issued and the defendant be ordered to appear in court, before Honorable R. Allan Edgar for a hearing to determine whether the term of supervision should be revoked.

Respectfully submitted by,

/s/ Don Johnson
Donald E. Johnson
U.S. Probation Officer
Date: March 5, 1996

APPROVED BY:

/s/ Leslie A. Cory 3-5-96
Leslie A. Cory, Date:
Supervising U.S. Probation Officer

ORDER OF COURT:

A warrant is to be issued and the defendant is ordered to appear in Court for a hearing to determine whether the term of supervision should be revoked.

So ordered.

ENTER.

/s/ John Y. Powers
The Honorable John Y. Powers

3-5-96
Date

[p. 1] IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

AT CHATTANOOGA

UNITED STATES OF AMERICA, Plaintiff, -versus- CORNELL JOHNSON, Defendant.	:	CR-1-93-138 (Filed May 18, 1998)

Chattanooga, Tennessee
April 30, 1998

BEFORE: THE HONORABLE R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

JOHN MacCOON, ESQ.,
Assistant United States Attorney
1110 Market Street, Suite 301
Chattanooga, Tennessee 37402

FOR THE DEFENDANT:

PERRY H. PIPER, ESQ.,
Federal Defender Services
Flatiron Building, Suite 203
Chattanooga, Tennessee 37402

REVOCATION HEARING
VOLUME I
PAGES 1 through 10

[p. 2] THE CLERK: Criminal Action 1-93-138, United States of America versus Cornell Johnson.

THE COURT: Okay. Mr. Johnson, it's been alleged here that you have violated the terms of your supervised release and there is a petition to revoke that supervised release before the Court. Are you aware of that?

THE DEFENDANT: Yes, sir.

THE COURT: And it's charged here that you have violated the condition of your supervised release which provides that you shall not commit another federal, state or local crime. And it's also alleged that you violated the condition you should not leave the judicial district without the permission of the Court or the applicable probation officer. And, essentially, as I understand it, the allegation is that you left, I think you were being supervised in Georgia at the time in Georgia, and you left there and went up to Virginia and committed some criminal offenses of which you were convicted. That's what the allegation is.

Mr. Piper, I guess I'll ask you first what your client's position is with respect to whether or not he has violated the terms of his supervised release?

MR. PIPER: We admit as to both violations, Judge.

THE COURT: Okay. Is that correct, Mr. Johnson?

THE DEFENDANT: Yes, sir.

[p. 3] THE COURT: Okay. The next question then becomes what is to be done about it. The policy statement I think in the case are 18 to 24 months. Did you want to respond to that?

MR. PIPER: Thank you, Judge. I do think the statutory maximum is also 24 months as well.

THE COURT: I think that's right.

MR. PIPER: Class D felony. Your Honor, I've had about three opportunities to speak with Mr. Johnson since he was brought in last week. He's a very bright man. He has a bachelor's degree I think from South Carolina, is that correct?

THE DEFENDANT: Yes.

MR. PIPER: University of. I think his intentions have always been to go straight here. I don't know what little glitch caught up with him, what little bump in the road caught up with him, made him go to Newport News, Virginia and do these things. He is genuinely sorry that he did, not just for the fact that he got caught. He intends, whatever happens here today, he knows he's going to get time, and he intends to go straight once he does get out of here. He's had previous difficulties with the law and legal system. As I stated, Mr. Johnson has a desire and the flesh is willing and I hope the will is there to get out and go straight and get a job, further his education.

[p. 4] THE COURT: Mr. Johnson, is there anything that you want to say to the Court?

THE DEFENDANT: Yes, sir. Your Honor, you know, I regret the choices that I made which have brought me here today. And when I got out of prison the last time I was very optimistic, Your Honor, very optimistic about going back into the community, gaining stable employment and getting on with my life. As a matter of fact, while I was in the halfway house, I took a test with the civil service, state civil service office in Georgia and I scored a 95 on the senior caseworker exam. And I was interviewed for the job after I left the halfway house and a week after my interview I was offered the position and they called my probation officer and told him that I had been offered a position in Augusta and I would have to transfer and I was all excited.

And, I mean, he's not here to defend himself and I'm not saying it's his fault that I got in trouble, you know, I could never say that because that would be irresponsible and that would be passing the buck per se, but I called him and told him and he contacted the Department of Family and Children Services in Augusta and he went into my criminal past. And, of course, I went into my criminal past but not indepth during the interview. And, of course, they called me back and subsequently said they had to withdraw the offer.

[p. 5] And, you know, needless to say I felt crushed, and I was devastated, but I can't blame him for that. And, of course, being arrested in Virginia and doing time there, I mean, I regret all of that and I'm truly sorry for what I did, but I look forward to the future also. I've already started making plans to reenter graduate school once I'm released from prison, what I plan is while I'm working in Unicorp in prison, if I get to a halfway house, save money

there enough to get my foot in the door to pursue a master's degree in rehabilitation counseling at the University of South Carolina. If I weren't standing here today, I would still, I still plan to do that regardless of what happens today, nothing is going to stop me from doing that. I'm passionate about it. It's something I really want to do and it's something I can feel myself doing sincerely. That's all I've got to say.

THE COURT: Mr. MacCoon.

MR. MacCOON: Nothing to add, Your Honor. Thank you.

THE COURT: Mr. Johnson, I remember you were here the last time and I was optimistic at that time because you are an intelligent person. You've got some ability. But for some reason you keep doing the same type of criminal offense. I mean, you've had a previous, now, two previous federal convictions in addition to numerous state convictions, and of [p. 6] course, you do have some restitution yet to pay as a result of this offense, the offense that you were convicted here of originally which, you know, you're going to have to pay. I hope you can go to graduate school, and I'm all for that, I encourage you to do that, but, unfortunately, you do have a few obligations to meet too as well. We're faced here with, of course, there is a need, at least a short one, to protect the public from the kind of activity that you have engaged in. I certainly hope that you will be able to keep this, keep from doing this in the future and surely you can see that this is a dead end street.

THE DEFENDANT: Yes, sir.

THE COURT: But, anyway, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant's supervised release is revoked and the defendant, Cornell Johnson, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 18 months.

It is further ordered that the defendant shall pay restitution, and I recognize you did pay some restitution.

THE DEFENDANT: Yes, sir, I did the best I could, Your Honor.

THE COURT: You did pay some of it, but not all of it.

THE DEFENDANT: Minimum wage jobs, I did the best I could.

[p. 7] THE COURT: Right. Restitution amount $286.96 to Food Lion, Incorporated, and 3,000 to Western Union of Bridgeton, Missouri for a total of $3,286.96. This figure represents the balance due on the restitution originally ordered in Case No. 1-93-CR-138. The restitution shall be paid in full immediately through the United States District Court.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 12 months. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which you're released. Within 72 hours, you understand?

THE DEFENDANT: Yes, sir.

THE COURT: While on supervised release, the defendant shall not commit another federal, state, or local crime, shall comply with all the standard conditions that have been adopted by this Court in its Local Rule 83.10, and shall not illegally possess a controlled substance.

The defendant shall not possess a firearm as defined in 18 U.S.C. 921.

There are some other special conditions of supervised release, drug testing, substance abuse testing at the discretion of the probation officer, a program of mental health treatment as directed by the probation officer. [p. 8] Paying your restitution. Access to any requested financial information by the probation officer.

And you would not open any new lines of credit or obtain any credit without the approval of the probation officer.

Any questions?

MR. PIPER: Judge, Mr. Johnson and I obviously discussed once again the supervised release issue. I would ask that the dispositional report be made a part of the record and would note his original sentence as reflected in the dispositional report is February 28th of '94. It's a Class D felony. And I do believe Mr. Johnson, and I discussed it with him yesterday, obviously, about the ex post facto issue, and I would certainly hope that the Supreme Court would decide this issue one of these days.

THE COURT: Are you appealing all of these?

MR. PIPER: Unfortunately the last two I've sent up have been very short briefs, mine are generally short anyway. I feel like I have an obligation to do it, Judge.

THE COURT: Even though the law in the circuit is clearly to the contrary?

MR. PIPER: Ms. Prewitt and I had a discussion about that recently and I question whether or not I should continue to do it, she believes that I should, so . . .

THE COURT: Okay. I mean, that's fine.

[p. 9] MR. PIPER: We would ask –

THE COURT: I thought you all had something better to do over there.

MR. PIPER: I have plenty more better to do. I have plenty much to do, and I agree, but we would ask the dispositional report be made a part of the record, Your Honor, and raise that objection to the ex post facto issue.

THE COURT: The dispositional report to be made a part of the record?

MR. PIPER: For appeal, yes, sir. And the reason why I ask for that is because the 6th Circuit, it's generally not a part of the record on appeal, and that's the way that I can get into evidence the fact that his conviction –

THE COURT: Okay.

MR. PIPER: Thank you.

THE COURT: It's part of the record, so ordered, let it be done. If you want to appeal this, Mr. Johnson, we

were just talking about that here, if you want to appeal this, you can do so, discuss it with Mr. Piper, and a notice of appeal has to be filed within 10 days to start that process.

All right. Anything else? Okay. We'll be in recess until 10 o'clock.

MR. PIPER: Thank you.

END OF REVOCATION HEARING

[p. 10] I, Shannan Andrews, do hereby certify that I reported in machine shorthand the proceedings in the above-styled cause held April 30, 1998, and that this transcript is an accurate record of said proceedings.

/s/ Shannan Andrews
Shannan Andrews
Official Court Reporter

U.S. Probation Office

United States District Court
for the Eastern District of Tennessee

DISPOSITIONAL REPORT

Name of Offender: Cornell Johnson
Case Number: CR-1:93-138-002

Name of Sentencing Judicial Officer: Honorable R. Allan Edgar

Date of Original Sentence: 02/28/94

Original Offense: Conspiracy to Produce, Use, and Traffic in Counterfeit Access Devices in violation of Title 18 U.S.C. § 1029(b)(2)

Class: D Felony

Criminal History Category: V

Original Sentence: Twenty-five month term of incarceration to be followed by a three year term of supervised release with the following conditions: (1) The defendant shall pay restitution in the amount of $663.96 to Food Lion, Inc. of Salisbury, N.C., and $3,000 to Western Union of Bridgeton, MO, for a total of $3663.96; (2) The defendant shall provide the probation officer with access to any requested financial information; (3) The defendant shall not incur any new lines of credit or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule; (4) The defendant shall participate in a program of testing and/or drug treatment as directed by the probation officer; (5) The defendant

shall participate in a program of mental health treatment as directed by the probation officer.

Type of Supervision: Supervised Release

Date Supervision Commenced: 8/14/95

Date Supervision Expires: 08/13/98

Assistant U.S. Attorney: Gary Humble

Defense Attorney: Perry Piper

Violation Number	Nature of Noncompliance
I	***VIOLATION OF GENERAL CONDITIONS OF SUPERVISION***: The defendant shall not commit another federal, state, or local crime.
II	***VIOLATION OF STANDARD CONDITION #1***: The defendant shall not leave the judicial district without the permission of the Court or probation officer.

STATUTORY PROVISIONS: Title 18 U.S.C. § 3583(e)(3) provides that the court may revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post release supervision, if it finds by a preponderance of the evidence that the defendant violated a condition of supervised release.

The defendant was originally convicted of a Class D felony, therefore, upon revocation the court may not impose a sentence of imprisonment greater than two years. Also, pursuant to 18 U.S.C. § 3583(h), and the 1997

Sixth Circuit ruling in *U.S. v. Page*, 96-4329, the court may reimpose supervised release after revocation, even in cases in which the original crime occurred prior to enactment of 18 U.S.C. § 3583(h), provided that any term of imprisonment that the defendant is ordered to serve is less than the maximum term of imprisonment authorized by statute under 18 U.S.C. § 3583(e)(3). If supervised release is reimposed in this case the statute sets a maximum term of 3 years.

POLICY STATEMENT/GUIDELINE PROVISIONS: Mr. Johnson's violations consist of Grade B violations as defined in U.S.S.G. Pursuant to 7B1.3(a)(1), upon a finding of a Grade B violation, the court shall revoke supervised release.

With a Criminal History Category of V and Grade B violations, in accordance with U.S.S.G. § 7B1.4(a), Mr. Johnson's range of imprisonment is 18-24 months.

U.S.S.G. § 7B1.3 provides that where supervised release is revoked and the term of imprisonment imposed is less than the maximum term of imprisonment imposable upon revocation, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

Pursuant to U.S.S.G. § 7B1.3(d) any restitution previously imposed in connection with the sentence for which revocation is ordered that remains unpaid shall be

ordered to be paid in addition to the sanctions determined under § 7B1.4 (Term of Imprisonment). The offender has an outstanding restitution balance of $3,286.96.

HISTORY OF SUPERVISION/COMPLIANCE WITH CONDITIONS: Mr. Johnson's supervision term commenced on August 18, 1995. He was on supervision for only seven months before violating the conditions of his supervision by engaging in criminal conduct which subsequently resulted in his being convicted on new felony and misdemeanor charges, and being sentenced to a term of imprisonment in Virginia. Additionally, Mr. Johnson traveled outside the jurisdiction of his supervision without the permission of his probation officer as is evidenced by his arrest in March 1996 in Newport News, Virginia.

Prior to the above-cited violations, the offender appeared to be in compliance with his supervision conditions, including his monthly restitution payment schedule of $50. He did, however, experience some difficulty maintaining steady, stable employment.

COURT ACTION TO DATE:

Mr. Johnson was arrested in March 1996, in Newport News, Virginia on a total of ten counts of Fraud and Uttering charges. He was convicted in the Circuit Court of Newport News, Virginia on July 25, 1996 for the offenses of Forgery (Docket No. 33726-96), and Uttering (Docket No. 33725-96). He was sentenced to a ten year term of imprisonment for each law violation. The court suspended the execution of nine years of his sentence for

the offense of Forgery and nine and one-half years for the offense of Uttering.

The offender was also convicted on July 26, 1996 in the Newport News General District Court for the offenses of Obtaining Money by False Pretense (Docket No. 96-005237), and Larceny by False Pretense (Docket No. 96-005239). He was sentenced to serve a 12-month jail term on each charge. The remaining criminal charges against the offender in Newport News, Virginia were nolle prosequi.

The offender was in the custody of the State of Virginia until his release to the supervised release detainer on March 31, 1998. A removal hearing was held in Newport News that date, at which time the Court ordered that Mr. Johnson be returned to the Eastern District of Tennessee to answer to the charge of violating his conditions of supervised release.

On April 24, 1998, the offender appeared before Magistrate John Y. Powers in the Eastern District of Tennessee for a preliminary hearing at which time he was ordered to be detained pending a revocation hearing. Mr. Johnson is scheduled to appear for a revocation hearing on May 30, 1998 at 9:30 a.m. before U.S. District court Judge R. Allan Edgar.

Respectfully submitted,

/s/ Angela W. Hayes
Angela W. Hayes
U.S. Probation Officer

APPROVED:

/s/ Leslie A. Cory 4/28/98
Leslie A. Cory Date
Supervising U.S. Probation Officer

VIOLATION WORKSHEET

1. DEFENDANT

Cornell Johnson

2. DOCKET NUMBER (Yr/Sequence Def. No.)

cr-1-93-138-002

3. DISTRICT/OFFICE

Eastern District of Tennessee – Chattanooga

4. ORIGINAL SENTENCE DATE

02/28/94

(if different from above):

5. ORIGINAL DISTRICT/OFFICE

Eastern District of Tennessee – Chattanooga

6. ORIGINAL DOCKET NUMBER (Yr/Sequence Def. No.)

Same

7. **List each violation and determine the applicable grade** (*See* 7B1.1):

	Violations	Grade
1.	The defendant shall not commit another federal, state, or local crime.	B

2. The defendant shall not leave the judicial district without the permission of the Court or probation officer. C

8. **Most Serious Grade of Violation** (*See* 7B1.1(b)): B

9. **Criminal History Category** (*See* 7B1.4(a)): V

10. **Range of Imprisonment** (*See* 7B1.4(a)): 18-24 months

11. **Sentencing Options for Grade B and C Violations Only:**

(CHECK APPROPRIATE BOX)

(A) If the minimum term of imprisonment determined under 7B1.4 (Term of Imprisonment) is at least one month but not more than six months, 7B1.3(c)(1) provides sentencing options to Imprisonment.

(B) If the minimum term of imprisonment determined under 7B1.4 (Term of Imprisonment) is more than six months but not more than ten months, 7B1.2(c)(2) provides sentencing options to imprisonment.

X (C) If the minimum term of imprisonment determined under 7B1.4 (Term of Imprisonment) is more than ten months, no sentencing options to imprisonment are available.

DEFENDANT *Cornell Johnson*

12. **Unsatisfied Conditions of Original Sentence**

List any restriction, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation (*See* 7B1.3(d)):

Restitution $3,386.96
Community Confinement

Fine $

Home Detention

Other

Intermittent Confinement

13. **Supervised Release**

If probation is to be revoked, determine the length, if any, of the term of supervised release according to the provisions of 5D1.1-1.3 (*See* 7B1.3(g)(1)).

Term to years

If supervised release is revoked and the term of imprisonment imposed is less than the maximum term of imprisonment imposable upon revocation, the defendant may, to the extent permitted by law, be ordered to recommense supervised release upon release from imprisonment (*See* 18:3583(e) and 7B1.3(g)(2)).

Period of supervised release to be served following release from imprisonment:

Up to 36 months less any term of imprisonment imposed provided that the term of imprisonment is less than 24 months.

14. **Departure**

List aggravating and mitigating factors that may warrant a sentence outside the applicable range of imprisonment:

15. **Official Detention Adjustment** (*See* 7B1.3(e)): months days.

UNITED STATES DISTRICT COURT
Eastern District of Tennessee at Chattanooga

UNITED STATES OF AMERICA

v.

Cornell Johnson

JUDGMENT IN A CRIMINAL CASE

(Filed May 1, 1998)

(For **Revocation** of Probation or Supervised Release)
(For Offenses Committed On or After November 1, 1987)

Case Number: **1:93CR00138-002**

Perry H. Piper
Defendant's Attorney

THE DEFENDANT:

[X] admitted guilt to violation of condition(s) **#1 and general cond.** of the term of supervision.

[ ] was found in violation of condition(s) _____ after denial of guilt.

Violation Number	Nature of Violation	Date Violation Occurred
1	The defendant failed to comply with the condition that he not commit another federal, state, or local crime.	03/03/1996
2	The defendant failed to comply with the condition that he not leave the judicial district without the permission of the Court or probation officer.	03/03/1996

The defendant is sentenced as provided in pages 2 through **6** of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has not violated condition(s) _____ and is discharged as to such violation(s) condition.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: **250-04-0337**

Defendant's Date of Birth: **05/09/1954**

Defendant's USM No.: **84669-071**

Defendant's Residence Address:
845 North Central Avenue #615
Hapevill GA 30354

Defendant's Mailing Address:
845 North Central Avenue #615
Hapevill GA 30354

04/30/1998
Date of Imposition of Judgment

/s/ **R. Allen Edgar**
Signature of Judicial Officer

R. ALLAN EDGAR
United States District Judge
Name & Title of Judicial Officer

May 1, 1998
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **18 month(s)**.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at ____ a.m./p.m. on ____.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **12 month(s)**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision – Page 4

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and treatment for drug and alcohol abuse as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

The defendant shall participate in a program of mental health treatment as directed by the probation officer.

The defendant shall pay any restitution that remains unpaid at the commencement of the term of supervision.

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur any credit charges or open additional lines of credit without the approval of the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$**	**$**	**$ 3,286.96**

[ ] If applicable, restitution amount ordered pursuant to plea agreement ..... $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

[X] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Western Union	$3,000.00	$3,000.00	
Food Lion, Incorporated	$286.96	$286.96	
Totals:	$ 3,286.96	$ 3,286.96	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and

shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Payments shall be made to: U.S. DISTRICT COURT, 800 MARKET ST., SUITE 130, KNOXVILLE, TN 37902

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

No. 98-5664

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	O R D E R
v.	)	(Filed Apr. 29, 1999)
CORNELL JOHNSON,	)	
Defendant-Appellant.	)	

Before: MARTIN, Chief Judge; BOGGS and COLE, Circuit Judges.

Cornell Johnson, represented by counsel, appeals a district court judgment imposing a new term of supervised release, following the revocation of his original term of supervised release. The parties have expressly waived oral argument, and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1994, Johnson pleaded guilty to conspiring to defraud, produce, use, and traffic in one or more counterfeit access devices, in violation of 18 U.S.C. § 1029(b)(2). The district court sentenced him to twenty-five months of imprisonment, plus three years of supervised release. While on supervised release, Johnson committed various state law offenses in Virginia, and he left the judicial district without permission. During a revocation hearing, Johnson admitted that he had violated the terms of his original supervised release, and the district court sentenced him to eighteen months of imprisonment, plus

twelve months of supervised release. Johnson has filed a timely appeal, arguing that the new term of supervised release violates the Ex Post Facto Clause.

Upon review, we conclude that the district court properly sentenced Johnson. *See United States v. Lloyd*, 10 F.3d 1197, 1220 (6th Cir. 1993), *cert. denied*, 511 U.S. 1043 *and* 1146 *and* 513 U.S. 883 (1994). Johnson's sentence does not violate the Ex Post Facto Clause. In order for a statutory modification of punishment to run afoul of the Ex Post Facto Clause: 1) the statute must apply retroactively to past conduct; and 2) the statute must work to the prejudice or disadvantage of the defendant. *See Miller v. Florida*, 482 U.S. 423, 430 (1987). This court has rejected Johnson's argument, concluding that the application of § 3583(h) does not violate the Ex Post Facto Clause. *See United States v. Abbington*, 144 F.3d 1003, 1005 (6th Cir.), *cert. denied*, 119 S. Ct. 344 (1998); *United States v. Page*, 131 F.3d 1173, 1175 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 77 (1998). Although several other circuits have concluded that the application of § 3583(h) does violate the Ex Post Facto Clause, *see United States v. Lominac*, 144 F.3d 308, 312-16 (4th Cir. 1998); *United States v. Dozier*, 119 F.3d 239, 242-44 (3d Cir. 1997); *United States v. Collins*, 118 F.3d 1394, 1397-99 (9th Cir. 1997); *United States v. Meeks*, 25 F.3d 1117, 1119 (2d Cir. 1994), these cases are not controlling authority in this circuit.

Accordingly, we affirm the district court's judgment.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
Clerk

Supreme Court of the United States

No. 99-5153

Cornell Johnson,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 18, 1999